STATE OF MICHIGAN
in the
SUPREME COURT

TERI ROHDE, BRENDON QUILTER, MARY QUILTER, WALTER MACKEY, BARBARA MACKEY, GARY GIBSON, ELLEN GIBSON, TED JUNGKUNTZ, LOISE JUNGKUNTZ, DAVID SPONSELLER, MARY SPONSELLER, MIKE GLADIEUX, MARTHA GLADIEUX, HELEN RYSSE, TERRY TROMBLEY, JOHN WILLIAMS, and THERESE WILLIAMS,

Plaintiffs-Appellants,

v

ANN ARBOR PUBLIC SCHOOLS a/k/a The Public Schools of the City of Ann Arbor, BOARD OF EDUCATION, ANN ARBOR PUBLIC SCHOOLS, KAREN CROSS, in her official capacity as President of the Board of Education for Ann Arbor Public Schools; and GLENN NELSON, in his official capacity as Treasurer of the Board of Education for Ann Arbor Public Schools,

Defendants-Appellees,

-and-

ANN ARBOR EDUCATION ASSOCIATION, MEA/NEA,

Intervening Defendant-Appellee.

_____/

Supreme Court No.128768

Court of Appeals No. 253565

Circuit Court No. 03-1046-CZ

INTERVENING DEFENDANT-APPELLEE'S BRIEF OPPOSING APPLICATION FOR LEAVE TO APPEAL

128768

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TABLE OF CONTENTS

INDEX OF AUTHORITIES AND EXHIBITS

Constitutional Provisions

Case Law

Statutes

Court Rules

Index of Exhibits

COUNTER-STATEMENT OF JURISDICTION AND GROUNDS FOR REVIEW

This court lacks jurisdiction over the instant case because Plaintiffs-Appellants have failed to establish that any of the required grounds for appeal exist pursuant to the applicable court rule. Plaintiffs-Appellants erroneously assert that this Court has jurisdiction pursuant to MCR 7.302(B)(1)-(3). MCR 7.302(B) establishes the grounds for jurisdiction and requires Plaintiffs-Appellants to show, in relevant part, that:

(1) The issue involves a substantial question as to the validity of a legislative act;

(2) The issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity; [or]

(3) The issue involves legal principles of major significance to the state's jurisprudence[.]

Plaintiffs-Appellants claim that the instant case meets these first three requirements of MCR 7.302(B) by improperly relying upon the underlying merits of the case rather than the actual issues on appeal. Plaintiffs-Appellants, in essence, assert that their appeal is two-part. First, they dispute the appellate court's affirmation of the lower court's determination that they lack standing, and from that opinion they seek leave to appeal. Second, they seek resolution of their claims regarding the Defense of Marriage Act (DOMA), MCL 555.1, by this Court without remand for a trial on the merits. In fact, they even attempt to add a new claim never presented to the trial court. Only the standing issue is before the Court in this appeal and should serve as the sole basis for determining jurisdiction under MCR 7.302(B)(1)-(3).

The issue of whether Plaintiffs-Appellants have standing to sue over their state law claims does not involve "a substantial question as to the validity of a legislative act"

as required by MCR 7.302(B)(1). No party questions the validity of MCL 129.61, governing taxpayer lawsuits for the misappropriation of public funds, which sets forth the standing requirements at issue. Plaintiffs-Appellants instead state their claims involve "substantial questions of Michigan law." However, the rule requires more than just a substantial question of Michigan law; it requires "a substantial question **as to the validity of a legislative act**." (Emphasis added.) Since the issue on appeal is one concerning standing requirements under MCL 129.61, and since no party challenges the validity of that law, Plaintiffs-Appellants' first stated basis for appeal is not satisfied.

Next, it cannot be said that the issue of Plaintiffs-Appellants' standing has the "significant public interest" required by MCR 7.302(B)(2). Plaintiffs-Appellants state that "the very purpose of MCL 169.71, (sic) is to authorize suits to prevent unlawful expenditures of public funds." While that may be true, the appellate court's determination that Plaintiffs-Appellants failed to meet the "demand" requirement of that law is of little significance to anyone but Plaintiffs-Appellants themselves. The effect of the appellate court's ruling was to clarify the "demand" requirement. It did not add anything new to the statute's standing requirements. In fact, the clarification of the "demand" requirement by the Court of Appeals can be easily followed by taxpayers in the future, so there will not be any significant impact on future taxpayer lawsuits. As such, there is no "significant public interest" in Plaintiffs-Appellants' failure to achieve standing for their claims. In likely recognition of this fact, Plaintiffs-Appellants again assert that the underlying merits of the case would meet the "significant public interest" requirement. While that may or may not be true, it is irrelevant since this issue is not on appeal, and the second stated ground for appeal cannot be satisfied on that basis. Therefore, Plaintiffs-Appellants have failed to establish this Court's jurisdiction pursuant

to MCR 7.302(B)(2).

Finally, Plaintiffs-Appellants again rely upon the merits of the case in an attempt to establish the grounds set forth in MCR 7.302(B)(3). They state that, "...if AAPS has authority to define, recognize, and subsidize same-sex 'domestic partnerships', then there is nothing to stop any mayor, city, or village from recognizing same-sex marriages under the guise of 'domestic partnerships.'" However, this is not the issue on appeal. The issue on appeal is whether Plaintiffs-Appellants have standing to pursue their claims, which is hardly a matter which "involves legal principles of major significance to the state's jurisprudence." The claims themselves are not subject to review at this time. As such, Plaintiffs-Appellants again fail to meet the grounds for appeal established by court rule.

Since Plaintiffs-Appellants have failed to establish any grounds whatsoever for their appeal, this Court is without jurisdiction to decide their claims and, as such, should deny their application for leave to appeal the decision of the Court of Appeals.

In addition to reviewing the appellate court's ruling as to their lack of standing, Plaintiffs-Appellants assert this Court should pass on the merits of their case despite the fact that no court below has yet done so, no discovery has taken place, and no hearing on the merits has yet been held. Plaintiffs-Appellants also boldly add a new cause of action to their claim without even seeking leave to amend their pleadings. They freely raise the amendment to Article 1, § 25 of the Michigan Constitution as dispositive of their underlying claims, yet this amendment came into effect while the standing issue was pending in the Court of Appeals. This Court should not entertain review of this new claim so late in these proceedings.

It has long been the rule that this Court will not review issues that were not raised

in and decided by the trial court.1 Issues raised for the first time in appeal are not ordinarily subject to review.2 However, Plaintiffs-Appellants erroneously contend that this Court has jurisdiction to render a decision on the merits of the original case, including the newly-raised constitutional issue. In support of this contention, Plaintiffs-Appellants cite just two cases which purport to give this Court authority to take up issues not previously raised in or decided by a lower court. A careful review, however, reveals no correlation between those cases and the instant appeal.3 To the extent this Court has ever exercised what Plaintiffs-Appellants refer to as this Court's "plenary authority", the merits were reached only to prevent a miscarriage of justice whereby the appealing party would have been left without a forum or remedy if appellate review was denied. That situation does not exist in this case. No miscarriage of justice will occur if the merits of the instant case are not immediately decided, as the opportunity for remand to the circuit court remains. Further, a determination of the merits is wholly unnecessary to resolving the basis of this appeal - the issue of standing. In addition, Plaintiffs-Appellants may simply cure the defects cited by the courts below and re-file

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1 "The failure to raise a question in the lower court precludes, as a general rule, the Supreme Court considering it on appeal." *Gordon Grossman Bldg. Co. v Elliott,* 382 Mich 596, 602; 171 NW2d 441 (1969). "An issue not pleaded nor otherwise presented to the trial court cannot be urged on appeal." *Allied Bldg. Credits v Mathewson,* 335 Mich 270, 275; 55 NW2d 826 (1952). "...[T]his Court does not and should not consider for the first time on appeal an issue not submitted to or passed upon by the trial court..." *Poelman v Payne,* 332 Mich 597, 605; 52 NW2d 229 (1952). "This court may not review what was not viewed by the trial court." *Stephenson v Golden,* 279 Mich 710, 733; 276 NW 849 (1937). "It would be going entirely beyond our authority to notice what has not been ruled on and excepted to below." *Maclean v Scripps*, 52 Mich 214, 223; 17 NW 815 (1883).

2 Booth Newspapers, Inc. v University of Michigan Bd of Regents, 444 Mich 211; 507 NW2d 422 (1993); Ruzitz v Serbian Nat. Home Soc., 315 Mich 292; 24 NW2d 125 (1946). "Inasmuch as this is a new question and the lower court had no opportunity to pass upon it, we decline to even consider it." City of Highland Park v Royal Oak No. 7 Storm Sewer Drain Dist., 309 Mich 646, 654; 16 NW2d 106 (1944).

3 Cases relied upon by Plaintiffs-Appellants include *People* v *Reed*, 449 Mich 375, 535 NW2d 496 (1995) (case dealing with ineffective assistance of counsel argument pursuant to court rules relating to post-appeal relief in criminal matters); *Koski* v *Vohs*, 426 Mich 424, 395 NW2d 226 (1986) (trial court and appellate court rulings on existence of probable cause were properly appealed for review by the Supreme Court).

their complaint. They will be in no worse position as a result of either of these options. They will not be left without a forum or remedy. There is no crisis related to the resolution of their standing issue which will cause any form of substantial harm to Plaintiffs-Appellants or their interests if the merits of their case are not decided right now by this Court. In fact, were this Court to entertain a decision on the merits of the case as requested by Plaintiffs-Appellants, it would be at the expense of the Defendants-Appellees, since the merits of the case have not been tried in the lower court and, as such, all avenues of legal relief have not yet been exhausted.

The order appealed from should remain the sole focus of this tribunal. The issue is whether the courts below erred in granting summary disposition to the Defendants-Appellants on the issue of standing. The merits of the case are irrelevant to this review and are certainly in no way necessary to resolve the issue of standing.

For these reasons, this Court does not have jurisdiction to review the underlying merits of this case, including the newly raised issue concerning the constitutional amendment, and should decline the invitation to do so because the case law does not support it and the requirements of justice do not call for it.

COUNTER-STATEMENT OF ISSUE ON APPEAL

I. **Do Plaintiffs-Appellants lack standing to sue pursuant to MCL 129.61?**

Intervening Defendant-Appellee's Answer:	YES
Defendants-Appellees' Answer:	YES
Circuit Court's Ruling:	YES
Court of Appeals Ruling:	YES
Plaintiffs-Appellants' Answer:	NO

COUNTER-STATEMENT OF ISSUE RAISED BY PLAINTIFFS-APPELLANTS WHICH IS NOT ON APPEAL

II. **Is AAPS's policy of providing domestic partner health benefits to same-sex partners of school district employees pursuant to its collective bargaining agreement with the AAEA consistent with Michigan law?**

Intervening Defendant-Appellee's Answer:	YES
Defendants-Appellees' Answer:	YES
Circuit Court's Ruling:	Did not rule
Court of Appeals Ruling:	Did not rule
Plaintiffs-Appellants' Answer:	NO

COUNTER-STATEMENT OF FACTUAL AND PROCEDURAL BACKGROUND

The following information concerning the background of this case is provided since it was not fully presented in the version set forth by Plaintiffs-Appellants:

Plaintiffs-Appellants are taxpayers residing in the Ann Arbor Public School District. Defendants-Appellees are the Ann Arbor Public Schools ("the AAPS"), the Board of Education of the AAPS ("the Board"), and two officers of the Board. The AAPS and Board are referred to collectively as "the District". The Intervening Defendant-Appellee is the Ann Arbor Education Association, MEA/NEA ("the AAEA"). The AAEA is the sole and exclusive bargaining representative of the teachers employed by the District.

The factual and procedural background of this case is relatively simple, since the case was dismissed soon after it was filed. Plaintiffs-Appellants filed suit against Defendants-Appellees on September 22, 2003, alleging misappropriation of public funds. (*Circuit Court Docket* entry 9/22/03.) In essence, Plaintiffs-Appellants complained that the District paid insurance premiums for same-sex domestic partner benefits in contravention of Michigan law, which defines marriage as between only a man and a woman, and prohibits same sex marriage. Plaintiffs-Appellants originally contended that recognizing and defining same-sex domestic partnerships somehow violates Michigan law by conferring a marriage-like status upon individuals in these relationships. Further, they complained that by providing health benefits to same-sex domestic partners of school district employees, Defendants-Appellees were misappropriating public funds because they were thereby making illegal expenditures. (*First Amended Complaint.*)

Since domestic partner benefits are collectively bargained, contractual benefits,

pursuant to the Public Employment Relations Act (PERA), MCL 423.201 *et seq*, AAEA, a labor organization, moved to intervene as a full party defendant in the case to protect the interests of its members, both present and future, as well as the integrity of the existing collective bargaining agreement. (*Circuit Court Docket* entry 10/27/03.) The motion was heard on October 29, 2003, and granted. (*Circuit Court Docket* entry 10/29/03.) Subsequently, Plaintiffs-Appellants filed their First Amended Complaint, purportedly to disclaim any interest in impacting existing contractual provisions, only future provisions. (*First Amended Complaint*, p. 3, para. 6.)

On November 7, 2003, Defendants-Appellees filed a motion for summary disposition, citing lack of standing and failure to state a claim upon which relief could be granted as the bases for dismissal. (*Defendants' Motion for Summary Disposition.*) The AAEA concurred. (*Circuit Court Docket* entry 11/21/03.) A hearing on the motion was held on December 17, 2003, and the circuit court judge issued his opinion and order granting the motion on December 30, 2003. (*Opinion and Order Granting Defendants' Motion for Summary Disposition.*)

Pursuant to the circuit court's order, there were two bases for dismissing the case. First, the court found that Plaintiffs-Appellants failed to bring their suit "on behalf of or for the benefit of the treasurer" as required by MCL 129.61. Second, the court determined that they failed to make a "demand" prior to filing suit, as required by the same law. Since the circuit court ruled that Plaintiffs-Appellants lacked standing to sue for these two reasons, the underlying merits of the case were never reached.

On January 9, 2004, Plaintiffs-Appellants filed a motion for reconsideration with the circuit court, which was subsequently denied on January 12, 2004. (*Plaintiffs' Motion for Reconsideration.* Also, *Opinion and Order Denying Plaintiffs' Motion for*

Reconsideration.) Plaintiffs-Appellants then filed a claim of appeal with the Michigan Court of Appeals on January 30, 2004, protesting the two bases the circuit court relied upon in determining they had no standing. While this matter was pending in the Court of Appeals, Plaintiffs-Appellants filed an Application for Leave to Appeal before this Court on or about March 12, 2004. Plaintiffs-Appellants sought this Court's review of the merits of the case, despite the fact that the merits had never before been decided. In an order dated April 30, 2004, this Court denied Plaintiffs-Appellants' Application for Leave stating that it was "not persuaded that the questions presented should be reviewed by this Court before consideration by the Court of Appeals." (Attached as Exhibit 1, *Supreme Court Order*.)

The focus of the case then shifted back to the Court of Appeals. Oral argument was heard on April 5, 2005, and the appellate court issued its opinion on April 14, 2005, affirming the lower court's determination that Plaintiffs-Appellants lack standing to sue. (Attached to Plaintiffs-Appellants' current Application for Leave to Appeal as Exhibit 2, *Court of Appeals Opinion*.) The appellate court declined to rule on the merits of the case stating, "Given our resolution of the standing issue, we need not consider plaintiffs' remaining issue." (*Court of Appeals Opinion*, p. 5.)

The matter now finds itself before this Court on the issue of standing. However, Plaintiffs-Appellants again ask this Court to decide the merits of their underlying claim without the benefit of even a hearing before, let alone an analysis and decision of, the circuit court. This Court should decline the invitation.

ARGUMENT

I. PLAINTIFFS-APPELLANTS LACK STANDING TO SUE PURSUANT TO MCL 129.61.

Plaintiffs-Appellants' lawsuit is rooted in a theory of unlawful expenditure of public funds. MCL 129.61 sets forth the requirements for taxpayer lawsuits brought against a township or school district for an accounting and/or return of misappropriated funds. That statute provides as follows:

> Any person or persons, firm or corporation, resident in any township or school district, paying taxes to such political unit, may institute suits or actions at law or in equity on behalf of or for the benefit of the treasurer of such political subdivision, for an accounting and/or the recovery of funds or moneys misappropriated or unlawfully expended by an public officer, board or commission of such political subdivision. **Before such suit is instituted, a demand shall be made on the public officer, board or commission whose duty it may be to maintain such suit followed by a neglect or refusal to take action in relation thereto**. Security for costs shall be filed by the plaintiff or plaintiffs in any such suit or action and all costs and expenses of the same shall be paid by the person or persons instituting the same unless and until a recovery of such funds or moneys be obtained as the result of such proceedings. (Emphasis added.)

The second of the three requirements of this statute is at issue in this appeal, though the AAEA believes that none of the three requirements were met. The primary question is whether Plaintiffs-Appellants failed to make a proper "demand" in advance of filing suit, as required by the statute. Both courts below determined Plaintiffs-Appellants did not. AAEA asserts the circuit court and Court of Appeals did not err in finding Plaintiffs-Appellants failed to conform to the requirements of the statute and thereby failed to establish standing.

A. Plaintiffs-Appellants failed to meet the requirements for standing pursuant to MCL 129.61.

It is incumbent upon the party invoking jurisdiction to meet the burden of

establishing all elements of standing. *Lee v Macomb Co,* 464 Mich 726,740; 629 NW2d 900 (2001), quoting *Lujan v Defenders of Wildlife,* 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 351 (1992) ("The party invoking ... jurisdiction bears the burden of establishing these elements."). "Standing" means that a party must have an interest in the case significant enough to provide effective advocacy. *Allstate Ins Co v Hayes,* 442 Mich 56; 499 NW2d 743 (1993). Having the same interest as a general citizen has been insufficient to evoke standing. *House Speaker v Governor,* 443 Mich 560; 506 NW2d 190 (1993). Michigan courts have described standing to require that a party have "an interest distinct from that of the public." *Lee,* supra.

The dissatisfaction of a taxpayer with the conduct or discretionary decisions of a school district does not alone provide an adequate basis for standing. However, the bar to taxpayer lawsuits is lifted pursuant to statutory authority under certain circumstances. One such statute is MCL 129.61 governing taxpayer suits for misappropriation and illegal expenditure of public funds by townships and school districts. That statute requires three things in order for a taxpayer to meet the "standing" requirement for such a suit: 1) the suit must be filed on behalf of or for the benefit of the treasurer of the township or school district; 2) a demand must be made in advance of the suit which is not pursued by the officer, board or commission involved; and 3) security for costs must be filed by the plaintiff. It is the burden of the taxpayer who elects to proceed in these kinds of cases to meet the standing requirements of the statute.

In this case, Plaintiffs-Appellants failed to meet all three requirements of MCL 129.61, though the circuit court relied only upon their failure to meet the first two requirements in dismissing the case. The Michigan Court of Appeals upheld the circuit court's dismissal, but determined that only the "demand" requirement had not been

satisfied. Since Plaintiffs-Appellants have not met all the standing requirements set forth in the statute, they lack standing to pursue their lawsuit and the lower courts' determinations in this case must be affirmed.

B. Plaintiffs-Appellants failed to make a "demand" prior to filing suit as required by MCL 129.61.

Both the circuit court and appellate court noted that the "demand" requirement of MCL 129.61 calls for more than a mere "request" that the Board cease making the expenditures in question. As part of their request for reconsideration of the circuit court's order dismissing their case, Plaintiffs-Appellants attached, for the first time, voluminous copies of letters they sent to various individuals, including some (but not all) members of the Board. The wording of the letters is substantially the same despite being sent by different combinations of Plaintiffs-Appellants to a variety of individuals, many of whom had no direct relationship to the Board. A sample of these letters appears in the Court of Appeals' opinion at page 4 as follows:

> I [or We] write to **request** that you investigate and halt the use of public funds to provide so-called "domestic partnership" benefits to employees of the Ann Arbor public schools. I [or We] believe that the School District's extension of these benefits to its employees exceeds its authority and violates the state law governing marriage. I [or We] **ask** that you halt this illegal use of public funds at your earliest possible convenience. [Emphasis added.]

No where in their "request" do Plaintiffs-Appellants make a "demand" for action. Further, their pleadings lack any reference whatsoever to a "demand." Paragraph 19 on page 6 of their *First Amended Complaint* states, in part, that "Plaintiffs...**requested** that the AAPS Board of Education, the County Prosecutor, the Department of Education, and the Attorney General halt this

illegal use of tax revenues in 2001. No action was taken as a result of their **request**." (Emphasis added.)

In an attempt to defend their deficient choice of words, Plaintiffs-Appellants make the assertion that using the word "demand" is a matter of semantics (despite the fact that it appears in the statute while the word "request" does not) and that "request" is more "civil," and therefore more likely to illicit the desired response of halting the allegedly illegal expenditures. Of course, they cite no legal authority for either of these assertions. If it is a change in the wording of the MCL 129.61 they seek in order to affect a kinder, gentler approach to misappropriation litigation, the legislature would be a better forum for such a suggestion. This Court would naturally reject an invitation to revise the letter, and therefore the meaning, of the law, as an unwarranted act of judicial activism outside the bounds of its authority. The plain language of the statute calls for a "demand." Plaintiffs-Appellants failed to adhere to that very simple, very basic requirement.

In addition, Plaintiffs-Appellants' "request" lacks any reference to the statute. As such, their "request" does not put the recipients on notice that judicial relief may be sought in the event of non-compliance with the request. The primary reason for requiring a demand such as that set forth in MCL 129.61 is to notify the addressee that there is specific authorization for the demand with the potential for corresponding legal consequences. By failing to make reference to the authorizing statute in their "request" letters, Plaintiffs-Appellants did not even adhere to the spirit of the "demand" requirement of MCL 129.61.

Further, MCL 129.61 requires that "[b]efore such a suit is instituted a

demand shall be made on the public officer, board or commission whose duty it may be to maintain such suit..." Plaintiffs-Appellants failed to send their "request" to the Board's treasurer. The treasurer is the person responsible for making expenditures on behalf of the Board, yet Plaintiffs-Appellants failed to notify the treasurer of their concerns. They sent letters to the county prosecutor, Governor, and Attorney General, but they did not send a letter to the Board's treasurer. Again, Plaintiffs-Appellants failed to adhere to a basic, simple, and very clear provision of the governing statute.

Michigan courts have long recognized the two-fold purpose behind statutory notice/demand requirements such as that found in MCL 129.61. First, notice is given to provide a defendant with the opportunity to investigate the claim while the evidence is still fresh. *Horner's Trucking Service, Inc.* v *Michigan State Highway Dept.*, 64 Mich App 513, 236 N.W.2d 122 (1975). Second, a notice requirement serves to prevent stale claims.4 In preventing stale claims, it is fundamental that legal action be taken in a timely manner after providing notice and an opportunity to cure. Here, Plaintiffs-Appellants waited nearly three years after filing their "request" with the Board before initiating legal action. This significant lag in time has the potential to force a very different composition of the Board to defend against claims aimed at actions of their predecessors. It targets a Board which may have had a different reaction to the original demand but was never put on notice of the claim and was, therefore, without reason to investigate it. The statute envisions prompt action on the part of a plaintiff. After all, the statute in question provides a means to police against the waste of taxpayer

4 *Turnley* v *Rocky's Teakwood Lounge, Inc*, 215 Mich App 371, 547 NW2d 33 (1996); *Brown* v *JoJo-Ab, Inc*, 191 Mich App 208, 477 NW2d 121 (1991); *Hussey* v *Muskegon Heights*, 36 Mich App 264, 193 NW2d 421 (1971).

money. What could be a bigger waste of taxpayer money than to have a public body defending against actions of its predecessor when timely notice through a proper demand may have resolved the claim?

Based on the foregoing, it is abundantly evident that Plaintiffs-Appellants lack standing to sue pursuant to MCL 129.61. They have failed to establish on appeal that they made proper demands on the proper people as required by the letter and spirit of the statute. As such, this Court should find that both courts below were correct in determining the "demand" requirement of MCL 129.61 was not satisfied and Plaintiffs-Appellants, therefore, lack standing.

C. Plaintiffs-Appellants failed to sue "on behalf of or for the benefit of the treasurer" as required by MCL 129.61.

Even if this Court does not agree with the rationale of the two lower courts regarding the "demand" requirement, there is an alternative basis to uphold dismissal of Plaintiffs-Appellants' *First Amended Complaint*. The AAEA contends that Plaintiffs-Appellants still failed to sue on behalf of the treasurer of AAPS. The treasurer was never named as a plaintiff in the case, but is a named defendant instead. Further, as pointed out by the circuit court in the order granting summary disposition, Plaintiffs-Appellants argue they are the real parties in interest, as opposed to the treasurer. And while the Court of Appeals acknowledged, at page 3 of its opinion, that the rules of statutory construction require that "every word and phrase must be ascribed its plain and ordinary meaning," the effect of its ruling on this issue is to strip the meaning from the words requiring suit on behalf of the treasurer. In so doing, the court reasoned that any successful suit would automatically be of benefit to the office of the treasurer, thereby obviating the need to name the treasurer at all (except, presumably, in non-

meritorious suits). This is an unworkable interpretation of the statute.

Based on the foregoing, it is abundantly evident that Plaintiffs-Appellants lack standing to sue pursuant to MCL 129.61. As such, this Court should uphold the rulings of the courts below as to lack of standing.

II. AAPS'S POLICY OF PROVIDING DOMESTIC PARTNER HEALTH BENEFITS TO SAME-SEX PARTNERS OF SCHOOL DISTRICT EMPLOYEES PURSUANT TO ITS COLLECTIVE BARGAINING AGREEMENT IS CONSISTENT WITH MICHIGAN LAW.

A. Michigan's defense of marriage act does not prohibit a public employer from entering into a collective bargaining agreement that includes same sex domestic partner benefits.

1. The DOMA merely regulates who may legally marry.

As set forth in the discussion above regarding this Court's jurisdiction, it is the position of AAEA that the merits of this case are not reviewable at this time. However, should the Court determine review is appropriate despite the arguments raised, it will necessarily conclude that the underlying claims lack merit and must be dismissed.

Plaintiffs-Appellants challenge the right of public employers and labor unions to bargain health benefits for same-sex domestic partners of covered employees. They erroneously rely upon the Defense of Marriage Act (DOMA), MCL 551.1, 551.271 and 551.272, in asserting that bargaining and providing domestic partner health benefits are somehow illegal. The DOMA was enacted in1996 to invalidate same sex marriages in Michigan, and to establish heterosexual marriage as the only legally recognized form of marriage in Michigan. The actual text of these statutes is as follows:

MCL 551.1

> Sec. 1. Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in

encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

MCL 551.271

Sec. 1. (1) Except as otherwise provided in this act, a marriage contracted between a man and a woman who are residents of this state and who were, at the time of the marriage, legally competent to contract marriage according to the laws of this state, which marriage is solemnized in another state within the United States by a clergyman, magistrate, or other person legally authorized to solemnize marriages within that state, is a valid and binding marriage under the laws of this state to the same effect and extent as if solemnized within this state and according to its laws.

(2) This section does not apply to a marriage contracted between individuals of the same sex, which marriage is invalid in this state under section 1 of chapter 83 of the revised statutes of 1846, being section 551.1 of the Michigan Compiled Laws.

MCL 551.272

Sec. 2. This state recognizes marriage as inherently a unique relationship between a man and a woman, as prescribed by section 1 of chapter 83 of the revised statutes of 1846, being section 551.1 of the Michigan Compiled Laws, and therefore a marriage that is not between a man and a woman is invalid in this state regardless of whether the marriage is contracted according to the laws of another jurisdiction.

The challenge raised by Plaintiffs-Appellants is bewildering, to say the least, since DOMA has absolutely nothing to do with the right of an employer, either in the public or private sector, to contract to provide certain health benefits to its employees. DOMA merely regulates who may and may not marry. Pursuant to its terms, only one man and one woman may enter into a legal contract of marriage. None of the parties to this appeal dispute this.

However, Plaintiffs-Appellants take DOMA one step further. They seem to argue that since DOMA states marriage can only be between a man and a woman, public policy has been created which pervasively discriminates against same-sex couples in all aspects of their public lives. Specific to this case is their claim that DOMA prohibits

the extension of health benefits to same-sex domestic partners of employees of a public employer. The rationale provided is that the employer is "treating" these employees as if they are married when they are not, and that is somehow illegal. It certainly stretches one's imagination to draw any logical, rationale connection between DOMA and health benefits offered by one's employer.

The plain truth is that the Michigan Legislature has not enacted any statute banning health benefits for same-sex domestic partners of employees of public employers. This void in the law is what drives Plaintiffs-Appellants to seek this Court's assistance. They would have this Court legislate where the legislature has not. This Court has refused this temptation in the past, and should do so here again.5

2. The Public Employment Relations Act, not the DOMA, governs collective bargaining in the public sector and does not prohibit bargaining over same-sex domestic partner benefits.

Michigan's Public Employment Relations Act (PERA), MCL 423.201 *et seq*, has long been established as the dominant law governing collective bargaining in the public sector.6 PERA was originally enacted in 1947, but has been amended multiple times since then, the most recent amendments occurring in 1994 and 1996. PERA has consistently been interpreted by this Court as the dominant law regulating public sector bargaining. In *Board of Education of the School District for the City of Detroit* v *Parks*, 417 Mich 268, 280; 335 NW2d 641 (1983), this Court stated:

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5 "It is the function of the court to fairly interpret a statute as it then exists; it is not the function of the court to legislate." *People* v *Jahner*, 433 Mich 490, 501, 446 NW2d 151 (1989). See also *Schwartz* v *City of Flint*, 426 Mich 295, 395 NW2d 678 (1986).

6 *Wayne County Civil Service Commission* v *Board of Supervisors*, 384 Mich 363, 184 NW2d 201 (1971); *Regents of University of Michigan* v *Employment Relations Commission*, 389 Mich 96, 204 NW2d 218 (1973); *Detroit Police Officers Association* v *Detroit*, 391 Mich 44, 214 NW2d 803 (1974); *Rockwell* v *Board of Ed. of School Dist. of Crestwood*, 393 Mich 616, 227 NW2d 736 (1975); *Kent Co. Deputy Sheriffs' Assoc.* v *Kent Co. Sheriff.*, 238 Mich App 310, 605 NW2d 363 (2000) *aff'd, but criticized*; *City of Lansing* v *Schlegel*, 257 Mich App 627, 669 NW2d 315 (2003).

> This Court has consistently construed the PERA as the dominant law regulating public employee labor relations." [Citations omitted]. When there is a conflict between PERA and another statute, PERA prevails, diminishing the conflicting statute *pro tanto*.

PERA precedes DOMA. As such, rules of statutory construction require that DOMA be read in harmony with PERA, as the legislature is presumed to be aware of prior enactments when authorizing new laws. *People* v *Harrison*, 194 Mich 363; 160 NW 623 (1916). Thus, reading DOMA to create a new prohibition in bargaining would be inconsistent with PERA and contrary to rules of statutory construction. In 1994, PERA was amended to prohibit public employers and employee unions from bargaining over certain subjects. One such prohibited subject of bargaining is the naming of the "policyholder of an employee group insurance benefit." MCL 423.215(3)(a). This prohibition illustrates the legislature's ability to regulate aspects of collective bargaining over insurance benefits in the public sector when such is its will. There is no prohibition in PERA against bargaining domestic partner health benefits, be they same sex or opposite sex in nature. Interestingly, the legislature amended PERA again in 1996, the same year they enacted DOMA, yet no further prohibitions on bargaining were added to PERA. In fact, the failure to address same sex domestic partner benefits at all either in the 1996 amendments or at any time subsequently indicates unwillingness on behalf of lawmakers to ban such domestic partner benefits from being bargained. Simply put, there is no law in Michigan that bans same sex domestic partner health benefits from being bargained for, or otherwise provided to, employees in the public or private sectors. As such, Plaintiffs-Appellants' claims must fail.

B. Article I, § 25 of the Michigan Constitution does not prohibit a public employer from entering into a collective bargaining agreement to provide same sex domestic partner benefits to its employees.

As set forth in the Counter-Statement of Jurisdiction and Grounds for Review, Plaintiffs-Appellants seek to introduce a new cause of action by arguing that AAPS' collectively bargained domestic partner benefits policy is contrary to the recently-passed amendment to the Michigan Constitution. This amendment came into effect while Plaintiffs-Appellants' suit was pending on appeal to the Court of Appeals. It is the position of the AAEA that this issue was never pleaded below, and, as such, is not reviewable here. However, should this Court opt to reach the issue despite the jurisdictional and faulty pleading issues, we will address this complex issue of first impression.

1. The plain language of the amendment merely regulates who may legally marry.

Since this is a matter of first impression in Michigan because the newly adopted amendment has yet to be interpreted by the courts, the rules of constitutional construction will apply. The primary and fundamental rule of constitutional or statutory construction is the court's duty is to ascertain the purpose and intent as expressed in the provision in question. *White* v *City of Ann Arbor*, 406 Mich 554; 281 NW2d 283 (1979). However, the technical tenets of statutory construction do not apply to constitutional provisions. *People* v *Nash*, 418 Mich 196; 341 NW2d 439 (1983). Separate and distinct principles are utilized in the interpretation and application of constitutional provisions, the foremost requiring the provision to be interpreted in accordance with the "common understanding." *In re Proposal C*, 384 Mich 390; 185 NW2d 9 (1971).

The first rule the Court should follow in ascertaining meaning of words in the

Constitution is to give effect to the plain meaning of such words as understood by the people who adopted it. *Bond* v *Public Schools of Ann Arbor School Dist.*, 383 Mich 693; 178 NW2d 484 (1970). In interpreting a Constitutional provision, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or mysterious meaning in words employed, but rather that they have accepted them in the sense most obvious to the common understanding. *Michigan Farm Bureau* v *Hare*, 379 Mich 387;151 NW2d 797 (1967).

Plaintiffs-Appellants would have this Court believe that the plain language of the Marriage Amendment prohibits same-sex domestic partner benefits for public sector employees and their partners. In fact, the plain language fails to address employee health benefits and clearly only pertains to who may marry. Const. 1963, Art 1, § 25 states:

> To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

As is readily apparent, the amendment concerns itself with the "benefits of marriage", not the benefits of employment (i.e. employer-provided health insurance). It preserves marriage as between one man and one woman, but does not even mention health benefits or other employment-related benefits. From the plain language of this amendment, the purpose is to prohibit any legal form of marriage between parties comprised of something other than one man and one woman. Thus, civil unions or similar arrangements between gay or lesbian couples may not be legally recognized in Michigan.

2. Providing same-sex domestic partner benefits is not akin to recognizing marriage.

Plaintiffs-Appellants assert the meaning of the language goes deeper than the plain and obvious meaning. They contend that the Marriage Amendment should be read such that any public employer who provides same-sex domestic partner benefits is somehow defeating the amendment by "recognizing" a "union" other than between one man and one woman "for any purpose" (in this case, for the purpose of providing health benefits). Plaintiffs-Appellants rely upon the recent opinion of this State's Attorney General in support of their contention. To their detriment, however, they make the same mistake the Attorney General made in his opinion by ignoring the vast body of legal authority from high courts in nine other jurisdictions which overwhelmingly supports the notion that providing domestic partner health benefits does not equate to recognizing a marriage or marriage-like relationship.7 In a case of first impression, Michigan courts have recognized that it is appropriate to rely upon decisions from other jurisdictions addressing similar legal issues.8 Despite this fact, Plaintiffs-Appellants and the Attorney General fail to make mention of these important, persuasive rulings. As a result, there is no reconciliation of their contention with that of every other jurisdiction which has considered like issues.

3. The intent of the ratifiers of the Marriage Amendment was not to impact family health benefits.

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7 *Knight* v *Swartzenegger*, 2004 WL 2011407 (Cal Superior, 2004); *Tyma* v *Montgomery Cnty. Counsel*, 369 Md 497, 801 A2d 148 (MD, 2002); *Heinsma* v *City of Vancouver*, 144 Wash2d 556, 29 P3d 709 (WA, 2001); *Pritchard* v *Madison Metro School Dist.*, 242 Wis2d 301; 625 NW2d 613 (WIS APP, 2001); *Lowe* v *Broward County*, 766 So2d 1199 (Fla App 4 Dist, 2000); *Crawford* v *City of Chicago*, 304 Ill App 3d 818; 710 NE2d 91 (ILL APP, 1999); *Slattery* v *City of New York*, 179 Misc2d 740, 686 NYS2d 683 (NY Sup, 1999); *Connors* v *Boston*, 430 Mass 31, 714 NE2d 335 (Mass, 1999); *Schaefer* v *City of Denver*, 973 P2d 717 (Colo App, 1998).

8 *City of Detroit* v *Detroit Police Officers Ass'n*, 408 Mich 410; 294 NW2d 68 (1980); *Power Press Sales Co* v *MSI Battle Creek Stamping*, 238 MichApp 173; 604 NW2d 772 (1999).

Plaintiffs-Appellants ignore the history of the Marriage Amendment leading to its passage, and therefore fail to arrive at its correct reading. One of the most important methods of ascertaining the meaning of a constitutional provision is to consider the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished. *In re Proposal C*, supra. This is particularly applicable when considering a constitutional amendment. Constitutional provisions must be interpreted with reference to the times and circumstances under which the Constitution was formed, and the general spirit of the times and the sentiments prevailing among the people. *People* v *Harding*, 53 Mich 481; 19 NW 155 (1884).

The circumstances leading to the passage of the Michigan Marriage Amendment have not been established in this case (or any other) since Plaintiffs-Appellants have suddenly added this new claim in the course of appealing their original claim. There have been no hearings or taking of testimony, not even any discovery or exchange of exhibit lists. The absence of any record at all makes it impossible for this Court to employ the traditional and well-established methods of construing this amendment in light of its history because its history is unknown. However, there are two other cases which have been filed directly testing the Marriage Amendment. The first is an Ingham County Circuit Court Case (Case No. 05:368-CZ) in which the Plaintiffs seek declaratory relief from the Attorney General's opinion discussed above. The second is a recently-filed claim in federal district court in Kalamazoo challenging the amendment's constitutionality on grounds of equal protection. Those cases are better positioned for determination of the issues Plaintiffs-Appellants seek to improperly pursue in this Court. Their case is a standing case at this time. Had they cured their standing defects, they could have re-filed their case to properly include the constitutional claim, but they failed to do so. As such, it is certain the Marriage Amendment issues they are concerned

with will be addressed and resolved. But the instant case is not ripe for such a determination.

Given the opportunity to establish a record regarding the circumstances leading to the passage of the Marriage Amendment, the AAEA would establish the following turn of events:

- Over the backdrop of an ongoing national debate about same-sex marriage, state courts across the nation, beginning with Hawaii in 1993, started grappling with same-sex marriage prohibitions as relate to equal protection claims, generally finding such prohibitions to be unconstitutional.
- In 1996, partially in response to these judicial rulings, the United States Congress passed the Defense of Marriage Act, limiting marriage to the union of one man and one woman. Michigan followed suit, passing its own version of the law the same year.
- A Michigan ballot campaign committee called Citizens for Protection of Marriage ("CFPM") began a petition drive for a constitutional change in light of perceived weaknesses in Michigan's DOMA enabling courts to justify same-sex unions.
- In 2004, Michigan became one of 12 states where constitutional amendments on marriage were initiated.
- On or about July 5, 2004, the CFPM filed a petition with the Michigan Secretary of State, Bureau of Elections, seeking to amend Article I, Section 25 of the Michigan Constitution.
- Pursuant to Const. 1963, Art. 12, § 2, the CFPM submitted its "statement

of purpose" for approval by the Board of State Canvassers, which rendered a split decision as to the sufficiency of the statement.

- The CFPM sought, and was granted, relief through the Michigan Court of Appeals via a complaint for mandamus.
- Leading up to the November 2004 election, the CFPM produced and circulated a brochure describing the purpose and limitations of the proposed amendment, proclaiming, "Proposal 2 is *Only* about Marriage." See Exhibit 2.
- On November 2, 2004, the Marriage Amendment appeared on the electoral ballot and was approved by 58% of those voting.
- The amendment became effective December 17, 2004.

4. Plaintiffs-Appellants' reading of the Marriage Amendment is not in harmony with other provisions of the Michigan Constitution.

Constitutional provisions should be read in harmony. *People* v *Blachura*, 390 Mich 326; 212 NW2d 182 (1973) (*overruled on other grounds)*. Every statement in a State Constitution must be interpreted in light of the whole document. *Blachura*, supra. When two provisions of the Constitution appear to conflict in a measure, the courts must reconcile them as far as possible. *Kunzig* v *Liquor Control Commission*, 327 Mich 474; 42 NW2d 247 (1950). This becomes relevant because Plaintiffs-Appellants ask this Court to endorse a reading of the Marriage Amendment which runs contrary to other provisions of the Constitution guaranteeing equal protection and barring bills of attainder.

Article I, § 2 of the Michigan Constitution provides, in part, that, "No

person shall be denied the equal protection of the laws, nor shall any person be denied the enjoyment of his civil or political rights..." However, construing the Marriage Amendment to deny domestic partner health benefits to same-sex partners of public employees creates an equal protection dilemma by singling out an identifiable group of citizens for different treatment. Further, if the amendment is used to prohibit Michigan governmental units, both state and local, from even acknowledging the existence of same-sex relationships for purposes of providing employment protections, the amendment violates the equal protection clause per the ruling in *Romer* v *Evans*, 517 US 620; 116 SCt 1620 (1996). In that case, an amendment to the Colorado State Constitution forbade the extension of minority or protected status to homosexuals in the public workplace. The United States Supreme Court ruled that the amendment violated due process protections in that it was not rationally related to a legitimate state goal because it was both too narrow and too broad by identifying individuals with a particular trait and denying them broad-range protections. The Court found the amendment deprived gay and lesbian couples of the ability to participate in the democratic process by forever banning them from attaining any protection of any sort in the public workplace. The same concerns apply in this case, and as such, this Court should avoid any construction of Michigan's Marriage Amendment which would run contrary to the protections of the equal protection clause.

Finally, Article I, §10 of the Michigan Constitution prohibits bills of attainder, which are legislative or constitutional acts that impose a punishment on an identifiable group of citizens without benefit of a judicial trial. *Michigan State AFL-CIO* v Employment Relations Com'n, 453 Mich 362; 551 NW2d 165 (1996) (see concurrence of Justice Mallett). The United States Supreme Court overturned a law which made it a crime for a member of the Communist Party to hold office in a labor organization,

indicating the law amounted to an impermissible bill of attainder. *United States* v *Brown,* 381 US 437; 85 SCt 1707; 14 LEd2d 484 (1965). In *Brown* at 450, the Court found that the statute "designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability--members of the Communist Party." In the instant case, construction of the Marriage Amendment in the manner recommended by Plaintiffs-Appellants makes gay and lesbian couples "the persons who possess the feared characteristics" leading to their inability to secure work place protections, such as domestic partner health benefits, in the public sector.

CONCLUSION

Because the instant case is about standing, not the DOMA and certainly not the Marriage Amendment, this Court should decline to review the merits of the underlying matter. Other cases currently being litigated are better poised to establish the needed record and address the appropriate issues and challenges related to the Marriage Amendment, so there is no necessity to take those matters up here and now. It is evident that the amendment faces considerable legal hurdles which threaten its very viability if interpreted as Plaintiffs-Appellants propose. However, to pursue this line of challenge, Plaintiffs-Appellants should cure their defects and re-file their case to add this claim.

RELIEF REQUESTED

WHEREFORE, Intervening Defendant-Appellee, the Ann Arbor Education Association, MEA/NEA, respectfully requests that this Court deny Plaintiffs-Appellants' Application for Leave to Appeal.

Respectfully Submitted,

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